

United States
Court of Appeals
for the Ninth Circuit

WILLIAM LESLIE KOHL,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees,

and

ARTHUR J. SESSING,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a Corporation,
Appellees.

Transcript of Record

Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

NOV 4 - 1948

Nos. 11985-11984

United States
Court of Appeals
for the Ninth Circuit

WILLIAM LESLIE KOHL,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY and
MORRISON-KNUDSEN COMPANY, INC., a corporation,
Appellees,

and

ARTHUR J. SESSING,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

McMICKEN, RUPP & SCHWEPPE,
657 Colman Building,
Seattle 4, Washington.

Attorneys for Appellees:

GERALD DE-GARMO of Allen, Hilen,
Froude & DeGarmo,
1308-16 Northern Life Tower,
Seattle 1, Washington.

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1293

VERNON O. TYLER, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY and MORRISON-KNUDSEN, INC.
Defendants.

No. 1408

WILLIAM LESLIE KOHL, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

No. 1420

ARTHUR J. SESSING, Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Defendants.

MOTION FOR PERMISSION TO REOPEN
CAUSES FOR FURTHER PROCEEDINGS,
TO FILE AMENDMENTS TO ANSWERS
AND AFFIRMATIVE DEFENSES OF DE-
FENDANTS, AND TO INTRODUCE TESTI-
MONY IN SUPPORT THEREOF.

Comes now S. Birch & Sons Construction Com-
pany, a corporation, and Morrison-Knudsen Com-
pany, Inc., a corporation, defendants herein, and
respectfully [1*] move the above entitled Court for

* Page numbering appearing at foot of page of original
certified Transcript of Record.

permission to reopen the above entitled Causes for further proceedings, to file therein amendments to the Answers and Affirmative Defenses of the Defendants, to plead as further Affirmative Defenses to the plaintiffs' Complaints the following:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

And that the defendants be permitted by the Court to reopen the above entitled Causes, for the

purpose of [2] permitting defendants to introduce testimony in support of said additional defenses.

This Motion is based upon the files, records and proceedings herein, and upon the accompanying Affidavit of Gerald DeGarmo.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants.

State of Washington,
County of King—ss.

Gerald DeGarmo, being first duly sworn, on oath deposes and says: That he is an Attorney at Law, a member of the law firm of Allen, Hilen, Froude & DeGarmo, and one of the attorneys for the defendants in the above entitled actions.

That the above entitled actions were heard as consolidated Causes for the purpose of trial in the above entitled Court, commencing on the 7th day of May, 1946, and as a result of said trial Findings of Fact, Conclusions of Law and Judgment were entered in each of said Causes on the 28th day of May, 1946. That thereafter, and within the time permitted by law, the defendants in said Causes appealed from said Judgments to the Circuit Court of Appeals for the Ninth Circuit, which appeal was heard upon briefs and oral argument by the Circuit Court of Appeals at San Francisco, California on the 15th day of May, 1947, and said Causes taken under advisement.

That on the 1st day of May, 1947, while said Causes were pending in the Circuit Court of Appeals for the Ninth Circuit, there was passed by [3] the House and Senate of the United States, and thereafter signed by the President of the United States, so as to become law on the 14th day of May, 1947, H. R. 2157, otherwise designated and known as the "Portal-to-Portal Act of 1947", which said Portal-to-Portal Act of 1947 contains, among others, the following provisions:

"Sec. 9. Reliance on Past Administrative Rulings, Etc.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or

rescinded or is determined by judicial authority to be invalid or of no legal effect.”

* * * *

“Sec. 11. Liquidated Damages.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act.”

That following the passage of the foregoing mentioned Portal-to-Portal Act of 1947 the defendants [4] herein, and appellants before the Circuit Court of Appeals for the Ninth Circuit, filed in said Appellate Causes, with the Circuit Court of Appeals for the Ninth Circuit, Motions to Remand said Causes to the above entitled Court for further proceedings, and in order to permit the defendants herein to take advantage of the Provisions of the Portal-to-Portal Act of 1947, heretofore quoted, which said Motions were heard by the Circuit Court of Appeals for the Ninth Circuit on the 7th day of July, 1947 and resulted in the entry of an Order by the Circuit Court of Appeals for the Ninth Cir-

cuit on the 15th day of September, 1947, a certified copy of which is on file in each of the above mentioned Causes, and which said Order provides as follows:

“Upon motion of appellants in the above entitled cases all of the said cases are hereby remanded to the trial courts whence they came with instructions that appropriate and proper proceedings be permitted in the referred to court whereby appellants may proffer pleadings to the effect that all defenses permitted by sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue. We herewith make no decision or intimation as to the merits of the proffer.”

And that by Supplemental Order, dated October 13, 1947, said previous Order of September 15, 1947 was modified nunc pro tunc, as follows:

“Good cause appearing the order of this court of September 15th, 1947 wherein motions of appellants in the above entitled cases were granted remanding the said cases and that appropriate and proper proceedings be permitted in the trial courts to the end that appellants may proffer pleadings to the effect that all defenses permitted by Sections 9 and 10 of the Portal-to-Portal Act of 1947 are put in issue, is hereby amended nunc pro tunc so as to state Sections 9 and 11 of the said act instead of 9 and 10 thereof.” [5]

That a certified copy of said Order of October 13, 1947 is on file in each of the above entitled Causes.

That each of Sections 9 and 11, heretofore quoted,

is applicable to and constitutes a proper defense to the above entitled Causes, and that if permitted to interpose said defenses and introduce testimony in support thereof it can be shown by the defendants herein that in truth and in fact the defendants herein come within the purview of said statute and the provisions heretofore quoted.

GERALD DeGARMO.

Subscribed and sworn to before me this 15th day of October, 1947.

/s/ NORA E. GREENLAND,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Oct. 15, 1947. [6]

[Title of Court and Causes Nos. 1408-1420.]

ORDER UPON MOTIONS TO REOPEN
CAUSES FOR FURTHER PROCEEDINGS,
TO FILE AMENDMENTS TO ANSWERS
AND AFFIRMATIVE DEFENSES, AND
TO INTRODUCE TESTIMONY IN SUP-
PORT THEREOF.

This Cause having come on regularly for hearing on the 20th day of October, 1947, before the undersigned, one of the Judges of the above entitled Court, upon the Motions of the defendants in the above entitled Causes to reopen said Causes for further proceedings, to file amendments to the defendants' Answers and Affirmative Defenses and

to introduce testimony in support thereof; and said defendants having appeared by Gerald DeGarmo of Allen, Hilen, Froude & DeGarmo, their Counsel, and the plaintiffs having appeared by Mary Ellen Krug of McMicken, Rupp & Schweppe, their Counsel; and the Court having read and considered the Motions of the defendants and the Affidavits in support thereof, and the Affidavit of the Plaintiffs in resistance to said Motions, and having considered the files, records and proceedings herein and deeming itself fully advised in the premises: [7]

Now, Therefore, It Is Hereby Ordered that the Motions of the defendants herein, to file amendments to the Answers and Affirmative Defenses of the defendants herein and to introduce testimony in support thereof, be and the same are hereby granted in all particulars; conditioned, however, upon the terms that the defendants pay to the Attorneys for the plaintiffs, within fifteen (15) days from October 20, 1947, the sum of \$324.06 on account of out-of-pocket expense of the plaintiffs and their Counsel herein, and the sum of \$350.00 on account of Attorneys' fees, said sums to apply on account of the taxable and allowable costs and the allowances for Attorneys' fees respectively herein in the event of ultimate recovery by plaintiffs herein, but not to be repayable by plaintiffs or their Attorneys herein to defendants, or to be taxable as costs and disbursements by defendants, in the event of final judgment herein in favor of defendants, the said sums hereby or-

dered paid upon condition to be divided between the plaintiffs in the above entitled Causes in such manner as they may see fit and as may be determined between said plaintiffs and their Counsel herein, without obligation or duty on the part of defendants to see to such division and distribution between the plaintiffs.

The defendants except to that portion of the foregoing Order imposing terms and conditions, and the plaintiffs except to that portion of the foregoing Order granting the Motions of the defendants, and the exceptions are hereby allowed. [8]

Done In Open Court this 31st day of October, 1947.

JOHN C. BOWEN,
District Judge.

Approved as to form and notice of presentation waived. October 27, 1947.

McMICKEN, RUPP &
SCHWEPPE.

By MARY ELLEN KRUG.

Presented by

GERALD DeGARMO of Allen,
Hilen, Froude & DeGarmo,
Attorneys for Defendants.

[Endorsed]: Filed Oct. 31, 1947.

[9]

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER AND AFFIRMATIVE DEFENSES

Come now the defendants herein, and for Supplemental Answer and Additional Affirmative Defenses to the Complaint of the plaintiff, in accordance with leave granted by Order of this Court, dated October 31, 1947, plead and allege as follows:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon and administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended. [10]

Wherefore, the defendants pray that the Complaint of the plaintiff herein may be dismissed with prejudice, and that the defendants may have and recover their costs herein.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 5, 1947. [11]

[Title of Court and Causes; 1408 and 1420.]

NOTICE OF CONSTITUTIONAL QUESTION

Come now the plaintiffs by their attorneys undersigned and request the Court to deny the defendants' motion to reopen, upon the ground that said motion is based upon an Act of Congress, namely, The Portal-to-Portal Act of 1947, 29 U.S. C. §§ 251-262, which act is unconstitutional as to these plaintiffs, and plaintiffs hereby notify the Court that in plaintiffs' opinion this case falls under Federal Civil Procedure Rule 24(c) providing that when the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the Court shall notify the Attorney

General of the United States as provided in the Act of Congress of August 24, 1937, c. 754, § 1.

McMICKEN, RUPP &
SCHWEPPE.

MARY ELLEN KRUG,
Attorneys for Plaintiffs.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 20, 1947.

[12]

[Title of Court and Cause.]

MOTION OF THE UNITED STATES TO INTERVENE AND FOR TIME WITHIN WHICH TO FILE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF THE PORTAL-TO-PORTAL ACT OF 1947.

Now comes the United States of America, by its Attorney General, and pursuant to the Act of August 24, 1937 (c. 754, Sec. 1, 50 Stat. 751, 28 U.S.C. Sec. 401), moves to intervene and become a party to this action for the purposes and with all the rights provided by said Act of August 24, 1937, upon the ground that the constitutionality of the Portal-to-Portal Act of 1947, approved May 14, 1947, has been drawn in question in this action, and neither the United States nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto.

The United States further moves that the Court receive its pleading, entitled "Pleading of the United States in Intervention," which accompanies this motion in accordance with Rule 24(c) of the

Federal Rules of Civil Procedure, as its appearance in this action in support of the constitutionality of the said Portal-to-Portal Act of 1947, and in opposition to all pleadings, motions, and proceedings of any of the parties hereto, denying the validity of the said Act, or any part thereof, upon the ground that it is unconstitutional.

The United States moves also for leave to file a brief in support of the constitutionality of the said Portal-to-Portal [13] Act of 1947, within 30 days after service upon it of plaintiff's brief on the constitutional issue or such other time as the Court may deem reasonable.

TOM C. CLARK,

Attorney General.

By HERBERT A. BERGSON,

Acting Assistant

Attorney General.

/s/ J. CHARLES DENNIS,

United States Attorney.

/s/ FRANK PELLEGRINI,

Assistant United States

Attorney.

Of Counsel:

ENOCH E. ELLISON,

Special Assistant to the

Attorney General.

JOHANNA M. D'AMICO,

Attorney,

Department of Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947.

[14]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN
INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendant which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question. [15]

Wherefore, the United States of America prays that the Court enter a judgment herein which

shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947.

TOM C. CLARK,
Attorney General.

By /s/ HERBERT A. BERGSON,
Acting Assistant
Attorney General.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ FRANK PELLEGRINI,
Assistant
United States Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.

JOHANNA M. D'AMICO,
Attorney,
Department of Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947.

[16]

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues

as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendants, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without decision upon said appeal, to this Court by Order, signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947; to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and [61] issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and having listened to the argument of counsel, and having heretofore orally announced its decision herein, and being fully advised in the premises; now, therefore, the the Court does hereby make the following Supplemental:

FINDINGS OF FACT

I.

All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and' interpretations of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administration Agency.

II.

All practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as Amended.

Done In Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,

District Judge.

[62]

From the foregoing Findings of Fact the Court hereby deduces the following:

CONCLUSIONS OF LAW

I.

That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

II.

That defendants are subject to no liability to the plaintiff for or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.

III.

That Paragraph 7 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and the Judgment, heretofore entered herein on the 28th day of May, 1946, in favor of plaintiff and against defendants, should be vacated, set aside and held for naught.

IV.

That the action of the plaintiff herein should be dismissed with prejudice, and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants, to be taxed in accordance with law and the rules of this Court.

Done In Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed March 2, 1948.

[63]

[Title of District Court and Cause.]

SUPPLEMENTAL JUDGMENT

The foregoing Cause having been tried before the undersigned, one of the Judges of the above entitled Court, in May of 1946 upon the issues as then presented by the pleadings, and Findings of Fact, Conclusions of Law and Judgment, in favor of the plaintiff and against the defendants, having been signed, filed and entered on the 28th day of May, 1946; and said Cause having been thereafter duly appealed by the defendants to the Circuit Court of Appeals for the Ninth Circuit, and having been thereafter remanded by said Court, without decision upon said appeal, to this Court by Order, signed, filed and entered September 15, 1947, as amended by Order, signed, filed and entered October 13, 1947, to permit of the defendants proffering pleadings to interpose the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947; and defendants thereafter having duly moved for and having been granted permission to reopen this Cause and to file amendments to their Answers and Affirmative Defenses herein, to plead the defenses permitted under Sections 9 and 11 of the Portal-to-Portal Act of 1947, and said amendments having been filed and issue made thereon, and the issues as presented having been tried to the Court, and the Court having taken the Cause under advisement after the filing of briefs and [64] having listened to the argument of counsel, and having heretofore orally announced its decision herein, and having made and entered

Supplemental Findings of Fact and Conclusions of Law; and the Court being fully advised:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that Paragraph 7 of the Findings of Fact, Paragraphs 3, 5 and 7 of the Conclusions of Law, and Judgment, heretofore signed, filed and entered herein on the 28th day of May, 1946, be and the same are hereby vacated, set aside and held for naught.

It Is Further Ordered, Adjudged and Decreed that the action of the plaintiff herein be and the same is hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants and against the plaintiff, to be taxed in the manner provided by law and the rules of this Court.

Done In Open Court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by:

ALLEN, HILEN, FROUDE, &
DeGARMO.

By GERALD DeGARMO.

(Acknowledgment of Service.)

[Endorsed]: Filed March 2, 1948.

[65]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that William Leslie Kohl, appellant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 2nd day of March, 1948.

McMICKEN, RUPP &
SCHWEPPE.

/s/ MARY ELLEN KRUG,
Attorneys for Appellant.

[Endorsed]: Filed April 21, 1948.

[66]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Arthur J. Sessing, appellant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 2nd day of March, 1948.

/s/ McMICKEN, RUPP &
SCHWEPPE.

/s/ MARY ELLEN KRUG,
Attorneys for Appellant.

[Endorsed]: Filed April 21, 1948.

[66-a]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, William Leslie Kohl, the Appellant above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington as Surety, are held and firmly bound unto S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen, Inc., a corporation, the Appellees above named in the just and full sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of May, 1948.

The Condition of the Above Obligation Is Such, That if the said Appellant shall prosecute his appeal to effect and satisfy the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Court may judge and award if he fails to make his plea good, then the

above obligation to be void, else to remain in full force and virtue.

By WILLIAM LESLIE KOHL.

/s/ MARY ELLEN KRUG,

Attorney for Appellant.

UNITED PACIFIC

INSURANCE COMPANY.

By /s/ GERRY L. WHITE,

Attorney-in-Fact.

[Endorsed]: Filed May 24, 1948.

[67]

[Title of District Court and Cause.]

STIPULATION FOR EXTENSION OF TIME
TO FILE RECORD AND DOCKET CAUSE

It is hereby stipulated by and between the parties through their attorneys of record that the time within which the record of appeal must be filed and the action docketed in the Appellate Court may be extended to the 20th day of July, 1948.

McMICKEN, RUPP &
SCHWEPPE.

By MARY ELLEN KRUG,

Attorneys for Plaintiff,

Appellant.

ALLEN, HILEN, FROUDE &
DeGARMO.

By GERALD DeGARMO,

Attorneys for Defendants,

Appellees.

J. CHARLES DENNIS,

Attorney for United States of

America, Intervenor.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME
IN WHICH TO FILE RECORD AND
DOCKET CAUSE

Whereas notice of appeal in the above-entitled cause was filed by the above-named plaintiff, appellant, on the 21st day of April, 1948, and the time for filing the record on appeal and docketing said action in the Appellate Court has not yet expired, now, therefore, said plaintiff, appellant, moves that this Honorable Court enter its order extending the time for filing the record on appeal and docketing the cause in the Appellate Court to the 20th day of July, 1948, which date is not more than ninety (90) days after the filing of the notice of appeal herein.

McMICKEN, RUPP & SCHWEPPE,
By MARY ELLEN KRUG.

[Endorsed]: Filed May 25, 1948. [69]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD AND DOCKET CAUSE

This matter having come on to be heard this day before the undersigned Judge of the above-entitled Court on motion of the above-named plaintiff, appellant, and the stipulation of the parties hereto, and the Court having considered said mo-

tion and stipulation and being fully advised in the premises, and it appearing to the Court that the time for filing the record on appeal and docketing the action in the Appellate Court has not yet expired, and that the said motion is timely made, and good cause appearing therefore,

It Is Hereby Ordered, Adjudged and Decreed that the time for filing the record on appeal and docketing this action in the Appellate Court be and the same hereby is extended to the 20th day of July, 1948, which date is not more than ninety (90) days from the filing of the notice of appeal herein.

Done In Open Court this 25th day of May, 1948.

JOHN C. BOWEN,
Judge.

Order approved and notice of entry waived.

ALLEN, HILEN, FROUDE &
DeGARMO.

By GERALD DeGARMO,
Attorneys for Respondents.

Presented by:

MARY ELIEN KRUG.

[Endorsed]: Filed May 25, 1948.

[70]

In the District Court of the United States for the
Western District of Washington,
Northern Division

No. 1408

WILLIAM LESLIE KOHL,

Appellant,

vs.

S. BIRCH & SON CONSTRUCTION CO., a cor-
poration, and MORRISON-KNUDSEN CO.,
INC., a corporation,

Appellees,

UNITED STATES OF AMERICA,

Intervenor.

STATEMENT OF POINTS ON APPEAL

The appellant states that the points upon which he intends to rely upon appeal are the following:

1. The court erred in finding that all practices of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff-appellant in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the followings agencies of the United States, to-wit: The United States War Department, the Corps of Engineers of the United States War Department and the War Department Wage Administration Agency, or any agency of the United States.

2. The court erred in finding that all the prac-

tices of the defendants with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work week, or any such practices, were in good faith, or that the defendants had reasonable grounds [71] for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

3. The court erred in finding that the defendants relied in good faith, or at all, upon anything except the contract which they had with the War Department of the United States (Exhibit 13).

4. The court erred in holding that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 are constitutional.

Dated at Seattle this 28th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE,
Attorneys for Appellant.

/s/ MARY ELLEN KRUG.

(Acknowledgment of Service.)

[Endorsed]: Filed June 29, 1948.

[72]

[Title of District Court and Cause.]

DESIGNATION OF RECORD CONTENTS
ON APPEAL

Plaintiff and appellant hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Motion for Permission to Reopen Causes for Further Proceedings.

2. Order upon Motion to Reopen Causes for Further Proceedings.

3. Supplemental Answer and Affirmative Defenses.

4. Notice of Constitutional Question.

5. Motion of the United States to Intervene.

6. Pleading of the United States in Intervention.

7. Transcript of the Testimony.

8. Supplemental Findings of Fact and Conclusions of Law.

9. Supplemental Judgment.

10. Notice of Appeal. [73]

11. Costs Bond on Appeal.

12. Motion for Extension of Time to File Record and Docket Cause.

13. Order Granting Extension of Time.

14. Statement of Points on Appeal.

15. This Designation.

16. Stipulation Concerning Record on Appeal.

Dated at Seattle this 29th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE.

By MARY ELLEN KRUG,
Attorneys for
Plaintiff-Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed June 29, 1948.

[74]

In the District Court of the United States for the
Western District of Washington, Northern Division

No. 1420

ARTHUR J. SESSING, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees.

UNITED STATES OF AMERICA, Intervenor.

No. 1408

WILLIAM LESIE KOHL, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees,

UNITED STATES OF AMERICA, Intervenor.

No. 1293

VERNON O. TYLER, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION COM-
PANY, a corporation, and MORRISON-
KNUDSEN COMPANY, INC., a corporation,
Appellees,

UNITED STATES OF AMERICA, Intervenor.

STIPULATION CONCERNING RECORD ON APPEAL

Whereas the above-entitled actions were, pur-
suant to stipulation of the parties, consolidated for
the purpose of trial and tried as consolidated cases

before the United States District Court for the Western District of Washington, Northern Division, and by reason thereof the testimony introduced upon such trial is applicable to all three actions, and

Whereas these actions were previously appealed to the Circuit Court of Appeals for the Ninth Circuit, bearing the numbers 11465, 11464 and 11463, respectively, and

Whereas during the pendency of said appeals the Portal-to-Portal Pay Act of 1947 was passed by the Congress of the United States, and

Whereas the United States Circuit Court of Appeals for the Ninth Circuit remanded the said cases to the United States District Court for the Western District of Washington for further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947 to these causes of action, and

Whereas the present appeals in the above-entitled cases are from the determination of the United States District Court for the Western District of Washington with reference to the applicability of the Portal-to-Portal Pay Act of 1947 to the above-entitled actions, and

Whereas on the former appeals of these cases the transcript of the testimony introduced at the

trial was printed as a part of the record on appeal in the case of S. Birch & Sons Construction Company, a Corporation, and Morrison-Knudsen Company, Inc., a Corporation, appellants, vs. Vernon O. Tyler, appellee, No. 11463, and such transcript of testimony was not printed in the record on appeal in the other two causes set forth in the caption herein and a copy of a stipulation was [78] printed as a part of the record on appeal in the other two causes, and by such stipulation the transcript of testimony, as printed in cause number 11463 was incorporated in and by reference made a part of the record in causes numbered 11464 and 11465;

Now, Therefore, it is hereby stipulated by and between the parties through their attorneys of record:

That the records on the present appeals of the above-entitled causes shall embrace only matters occurring subsequent to the order of the Circuit Court of Appeals for the Ninth Circuit remanding said cases to the District Court for the further proceedings to determine the applicability of the Portal-to-Portal Pay Act of 1947; that for all matters occurring prior to said order the records on appeal in causes numbered 11463, 11464 and 11465 shall be and constitute the records in the present appeals; and

That the same procedure shall be followed in the present appeals as was followed in causes numbered 11463, 11464 and 11465, namely, the transcript of testimony introduced at the trial shall be printed as part of the record on appeal in Tyler, appellant, vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, appellees, and shall not be printed as a part of the record on appeal in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and Sessing vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, that in lieu of said transcript of testimony a copy of this stipulation shall be printed in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, and in Sessing vs. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a [79] corporation, and the transcript of testimony as printed in Tyler vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a corporation, shall by this reference be adopted and incorporated as a part of the record in Kohl vs. S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, Inc., a cor-

poration, and in *Sessing vs. S. Birch & Sons Construction Company*, a corporation, and *Morrison-Knudsen Company, Inc.*, a corporation.

Dated at Seattle this 29th day of June, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Appellants
Kohl & Sessing.

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for Appellant, Tyler.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Appellees.

J. CHARLES DENNIS,
Attorney for United States of
America, Intervenor.

[Endorsed]: Filed June 29, 1948.

[80]

[Title of Court and Causes Nos. 1293-1420-1408.]

STIPULATION CONCERNING ORIGINAL
EXHIBITS

It Is Hereby Stipulated by and between the above named parties, through their undersigned counsel of record, that the Clerk transmit to the Circuit Court of Appeals of the Ninth Circuit all of the original exhibits introduced in the trial of the above entitled cause.

WETTRICK, FLOOD &
O'BRIEN,

GEORGE R. STUNTZ,
By GEORGE J. TOULOUSE, JR.,
Attorneys for Plaintiff and
Appellant, Tyler.

ALLEN, HILEN, FROUDE &
DeGARMO,

By GERALD DeGARMO,
Attorneys for Defendants and
Appellees.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Plaintiffs-
Appellants, Kohl & Sessing.

J. CHARLES DENNIS,
United States Attorney.

[Title of Court and Causes Nos. 1293-1420-1408.]

**ORDER CONCERNING EXHIBITS
ON APPEAL**

This matter having come on duly and regularly before the undersigned judge of the above entitled court upon the Stipulation of the parties hereto through their respective counsels of record, and it appearing to the court that the Stipulation is in order, now, therefore, it is by the court

Ordered that all the original exhibits introduced and admitted in evidence in the above entitled action be transmitted as a part of the record of the above entitled action on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of a transcript of said exhibits, by the Clerk of the court.

Done in open court this 9th day of July, 1948.

JOHN C. BOWEN,
District Judge.

Approved as to form and Notice of Entry waived.

**ALLEN, HILEN, FROUDE &
DeGARMO,**

By **GERALD DeGARMO,**
Attorneys for Defendants and
Appellees.

Approved as to form and Notice of Entry
waived.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for Plaintiffs and
Appellants, Sessing and Kohl.

J. CHARLES DENNIS,
United States Attorney.

Presented by:

WETTRICK, FLOOD &
O'BRIEN,

By GEORGE J. TOULOUSE, JR.,

[Endorsed]: Filed July 9, 1948.

[84]

[Title of Court and Causes Nos. 1408-1420-1293-
1186-1628-1456]

STIPULATION

Whereas, the above-entitled actions were consolidated for the purposes of trial in the District Court and all testimony and all exhibits introduced in any one of the above-entitled cases was deemed to apply equally to all of the above-entitled cases, and

Whereas, the plaintiffs in the above-entitled cases have taken their appeals to the Circuit Court of Appeals for the Ninth Circuit,

Now, therefore, it is hereby stipulated by and between the parties, through their attorneys of record, that all the exhibits introduced on the trial of the above-entitled actions may be sent to the appellate court in the form in which they were introduced in lieu of copies.

Dated this 9th day of July, 1948.

McMICKEN, RUPP &
SCHWEPPE,

By MARY ELLEN KRUG,
Attorneys for plaintiff appellants Kohl and Sessing.

WETRICK, FLOOD &
O'BRIEN,

By GEORGE E. FLOOD,
Attorneys for plaintiff appellant Tyler.

By GEORGE J. TOULOUSE, JR.
ZABEL, POTH & PAUL,

By FREDERICK PAUL,
Attorneys for plaintiff appellants Lassiter, Morrison and Naylor & Owen J. McNally.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for defendant appellees S. Birch & Sons
Construction Company and Morrison-Knudsen
Company, Inc.

BOGLE, BOGLE & GATES,

By ROBERT GRAHAM,
Attorneys for defendant appellee Guy F. Atkinson
Company.

MAURICE McMICKEN,
Attorney for defendant appellee West Construction
Company.

J. CHARLES DENNIS,
Attorney for United States of America, Intervenor.

By FRANK PELLEGRINI,
Assistant United States Attorney.

[Endorsed]: Filed July 12, 1948. [87]

[Title of District Court and Cause No. 1408.]

**ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS**

This cause came on to be heard on motion of plaintiff appellant that the exhibits introduced at the trial of the above-entitled action shall be sent to the United States Circuit Court of Appeals for the Ninth Circuit in the form in which they were introduced in lieu of copies, and it appearing to the court that such original exhibits should be inspected by the appellate court;

Now, therefore, it is hereby ordered that the said exhibits shall be transmitted for exhibition to the United States Circuit Court of Appeals for the Ninth Circuit, subject to its further orders in regard thereto.

Done in open court this 12th day of July, 1948.

/s/ JOHN C. BOWEN,
Judge.

Presented by

MARY ELLEN KRUG.

Approved for entry:

WETTRICK, FLOOD &
O'BRIEN,

By GEO. J. TOULOUSE, JR.

Approved for entry:

ALLEN, HILEN, FROUDE
DeGARMO,

By G. DeGARMO,

Attys. for Appellees.

FRANK PELLEGRINI.

[Endorsed]: Filed July 12, 1948. [89]

[Title of Court and Cause No. 1408.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 89, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the reporter's transcript of testimony and proceedings transmitted as a part hereof (with which testimony and proceedings there is consolidated the testimony and proceedings in our Causes No. 1186, H. A. Lasiter and W. R. Morrison vs. Guy F. Atkinson Company, No. 1293, Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1420, Arthur J. Sessing vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co., No. 1456, Raymond N. Naylor vs. West Construction Co., and No. 1628, Owen J. McNally vs. S. Birch & Sons Construction Company and Morrison-Knudsen Co.) constitute the record on appeal herein from the supplemental judgment of said United States District Court for the Western

District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees for making record, certificate or return: 72 pages at 40c, \$28.80; 17 pages at 10c (copies furnished), \$1.70; Notice of Appeal, \$5.00; Total, \$35.50.

I hereby certify that the above amount has been paid to me by the attorneys for the appellant.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle in said District, this 15th day of July, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.

[Endorsed]: No. 11985-11984. United States Circuit Court of Appeals for the Ninth Circuit. William Leslie Kohl, Appellant, vs. S. Birch & Sons Construction Company and Morrison-Knudsen Company, Inc., a Corporation, Appellees, and Arthur J. Sessing, Appellant, vs. S. Birch & Sons Construction Company, and Morrison-Knudsen Company, Inc., a Corporation, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: July 19, 1948.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11985

WILLIAM LESLIE KOHL, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION

COMPANY, et al.,

Appellees.

UNITED STATES OF AMERICA, Intervenor.

No. 11984

ARTHUR J. SESSING, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION

COMPANY, et al.,

Appellees.

UNITED STATES OF AMERICA, Intervenor.

ORDER

The above-entitled matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the appellants herein for an order that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of testimony may be printed in the case of *Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc.*, No. 11983 only, and incorporated by reference in the other four cases, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support thereof,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of the testimony shall be printed in

the case of Vernon O. Tyler vs. S. Birch & Son Construction Company and Morrison-Knudsen, Inc., No. 11983 only and in the remaining cases a copy of the stipulation in support of the said motion shall be printed in lieu of such portions and such portions of the record shall be incorporated therein by reference.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

ORDER

This matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the above-named appellants for an order permitting all Exhibits in the above-entitled cases, consisting of three bound volumes of white background photostatic copies of various documents, to be considered in their original form by this Court and not be printed in the record, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support of said motion,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that all exhibits in the above-entitled

cases may be considered in their original form and not be printed in the record.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

MOTION

Come now the appellants in the above-entitled cases and move that the record on appeal in said cases be printed solely in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985; and that said record shall be entitled in both cases.

This motion is based on the stipulation of counsel attached hereto.

McMICKEN, RUPP & SCHWEPPE,
and MARY ELLEN KRUG,

By /s/ BERNARD REITER,
Attorneys for Appellants.

(Acknowledgment of Service.)

STIPULATION

Whereas, the pleadings and all matters of record in the two above-entitled cases are identical save only for the names of the parties and the amount of the judgment in each case; and,

Whereas, no useful purpose will be served by printing the record separately in each case;

Now, Therefore, it is hereby Stipulated by and between the parties, through their attorneys of record, that the record in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985, shall be entitled in both of said cases and shall stand as the record in both of said cases and that it shall not be necessary to print the record in the case of Sessing vs. S. Birch & Sons Construction Company, et al., No. 11984.

It Is Further Stipulated that a copy of this stipulation shall be included in the record as printed in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985.

Dated this day of, 1948.

McMICKEN, RUPP & SCHWEPPE,
and **MARY ELLEN KRUG,**

By /s/ **BERNARD REITER,**
Attorneys for Appellants.

**ALLEN, HILEN, FROUDE &
DeGARMO,**

By /s/ **GERALD DeGARMO,**
Attorneys for Appellees.

By /s/ **FRANK PELLEGRINI,**
One of Attorneys for Intervenor,
United States of America.

[Endorsed]: Filed September 7, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes.]

ORDER

This matter having come on regularly for hearing before the undersigned judges of the above-entitled court upon motion of the appellants for an order to the effect that the record on appeal need not be printed in the case of Sessing vs. S. Birch & Sons Construction Company, et al., No. 11984; and that the record in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985, shall be entitled in both of said cases;

Now, Therefore, It is hereby Ordered, Adjudged and Decreed that the record on appeal shall not be printed in the case of Sessing vs. S. Birch & Sons Construction Company, et al., No. 11984; and that the record in the case of Kohl vs. S. Birch & Sons Construction Company, et al., No. 11985 shall be entitled in both of said cases.

Done this 3rd day of September, 1948.

/s/ WILLIAM DENMAN,
Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed September 7, 1948. Paul P. O'Brien, Clerk.